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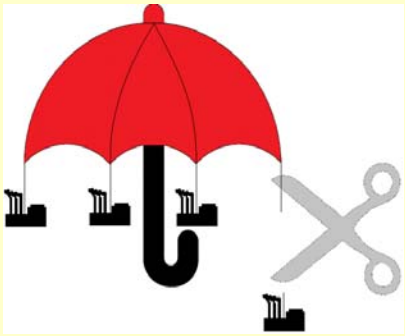
Railroad Retirement Taxes on Holding Companies? — NO Says the D.C. Circuit Court!



Fletcher and Sippel continues to be active in efforts to keep Railroad Retirement coverage within the bounds of the law. At the request of the ASLRRA, Ron Lane represented the Association in an appeal of another attempt by the RRB to expand it's coverage – this time to a closely-held, privately-owned railroad holding company.

In *Indiana Boxcar Corporation*, B.C.D.12-3, over the dissent of the Management Member, the Board extended affiliate coverage to a company that owned several railroads. Mr. Powell Felix and his wife owned the holding company. Mr. Felix also served as president of the subsidiary railroads. The majority of the Board concluded the holding company was under "common control" with its subsidiary railroads because of Mr. Felix's dual roles. In doing so, the Board refused to apply *Union Pacific Corp. v. United States*, 5 F.3d 523 (Fed. Cir. 1993), which established, as a matter of law, that holding companies are not under common control with their subsidiaries – they control the railroads.

For years, the Labor Member of the RRB has tried to resist the *Union Pacific* case, claiming at times that it should be limited solely to publicly-traded companies and at other times arguing it should be overturned. However, a majority of the Board has consistently applied the case, not only to large, publicly-traded holding companies but also to close corporations. Finally, in the *Indiana Boxcar* case, the Labor Member succeeded in persuading the current RRB Chair to limit *Union Pacific* to just publicly-traded companies.

At the appeal stage, ASLRRA and Indiana Boxcar pointed the D.C. Circuit to numerous pervious instances where the Board majority had applied *Union Pacific* to privately-owned, closely-held holding companies and argued that the Board could not now ignore its own precedent. *(Continued on page 5)*

IN THIS ISSUE

Directed Verdict in Crossing Case Upheld on Appeal

In our Fall 2011 Newsletter, we reported on a directed verdict entered by the District Court in Muscatine, Iowa in a grade crossing case involving Iowa Interstate Railroad, Ltd. and the Iowa Interstate engineer involved in the incident. The District Court found the plaintiff had failed to introduce sufficient evidence to prove that the whistle was not sounded, the signals were not working, and the crew failed to keep a proper lookout. The Court also found, as a matter of law, that the plaintiff was more than 50% negligent and, therefore, even if the railroad and its engineer were negligent, plaintiff's contributory negligence precluded recovery.

Plaintiff appealed the lookout and signalization claims and the Court's ruling on contributory negligence. Jim Helenhouse argued the case before the Iowa Court of Appeals. On March 13, 2013 the Appellate Court issued an opinion affirming the District Court. *(Continued on page 2)*

Directed Verdict *(Continued from Page 1)* *Garcia v. Iowa Interstate Railroad, Ltd.*, 2013 WL 988635.

As to the lookout claim, plaintiff argued the jury could have inferred an improper lookout from the fact that the emergency brake was not applied until the time of impact or from the conductor yelling out that plaintiff was not going to stop. The Appellate Court disagreed. The Court concluded that the plaintiff was travelling at a slow rate of speed, that drivers often approach a crossing and stop at the last minute, and that there was no evidence the conductor should have realized earlier that plaintiff was not going to stop.

As to the signalization claim, the Court concluded plaintiff's testimony about what she saw was equivocal at best. In contrast, the crew testified unequivocally that they saw the signals working as they approached the crossing. The Chief of Police saw the signals working when he arrived shortly after the collision. The Appellate Court held that, under these circumstances, the District Court's granting of a directed verdict was proper. If you want additional information about the case or a copy of the Appellate Court's opinion, contact Jim Helenhouse at 312-252-1501 or at jhelenhouse@fletcher-sippel.com

Summary Judgment Granted in Discrimination Claim

The Circuit Court of Cook County recently granted summary judgment to Iowa Interstate Railroad in a racial and disability discrimination claim. Fletcher & Sippel attorneys, Jim Helenhouse and Stephen Rynn, drafted and argued the successful motion.

Plaintiff, a conductor, was terminated after a series of rule violations over a three day period. Pursuant to his Union contract, plaintiff appealed two of the incidents to an appeal board and then to a Public Law Board (PLB). At each stage of the proceedings, his termination was upheld based on the repeated rule violations with which he was charged. Subsequently, plaintiff filed racial and disability discrimination claims with the Illinois Department of Human Rights. The Department found he had not come forward with sufficient medical documentation of his disability. Thus, the claim was dismissed for lack of jurisdiction. The Department also found that Iowa Interstate had not discriminated against him based on racial prejudice, but rather had terminated him for repeated GCOR rule violations in a manner consistent with how the railroad has acted in the past with Caucasian employees. Plaintiff then filed suit in the Circuit Court of Cook County, re-asserting his claims of racial and disability discrimination.

Iowa Interstate moved for summary judgment at the close of discovery. As to plaintiff's disability discrimination claim, Iowa Interstate argued plaintiff had failed to come forward with the required evidence of a disability at the Department of Human Rights and thus had not exhausted his administrative remedies. Because plaintiff failed to exhaust his administrative remedies, the Circuit Court did not have jurisdiction to hear the disability claim and, further, plaintiff could not make a prima facie case of discrimination because he failed to meet his employer's legitimate expectations, as evidenced by repeated rule violations upheld by the PLB. Plaintiff could not point to another employee, outside the protected class, with a similar history of rule violations who had received more favorable treatment. Stephen Rynn argued the motion of summary judgment. Immediately after arguments were made, the Judge ruled in Iowa Interstate's favor, noting that the rule violations alleged by Iowa Interstate were an important part of her decision.

There is no published order, but a copy of the hearing transcript is available on request to either Jim Helenhouse jhelenhouse@fletcher-sippel.com or Stephen Rynn srynn@fletcher-sippel.com or by calling either at 312-252-1500.

OSHA Updates

Railroads are seeing an influx of whistleblower claims brought pursuant to the Federal Railroad Safety Act, 49 U.S.C §20109. Some more recent cases are noted below:

Burden of Proof—Higher on the Railroad than the Plaintiff

The Third Circuit held that the burden of proof for a railroad in a whistleblower case is much higher than that of the plaintiff. According to the Court, it must first consider only whether the protected activity was a "contributing factor" in the retaliatory discrimination, not the sole or even predominant cause. The burden then shifts to the railroad to demonstrate by "clear and convincing evidence" that the railroad would have taken the same unfavorable personnel action in the absence of the protected activity. The Third Circuit stated that "for employers, this is a tough standard, and not by accident . . . the standard is 'tough' because Congress intended for railroads to face a difficult time defending themselves, due to a history of harassment and retaliation in the industry." *Araujo v. New Jersey Transit*, 708 F.3d 152 (3d Cir. 2013)

Similarly, The Department of Labor administrative Review Board ("ARB") recently reversed an Administrative Law Judge's decision in which the Judge concluded the railroad had proven it had a "legitimate business reason" to terminate an employee. The ARB held the Judge failed to apply the proper "contributing factor analysis" and further stated it was not sufficient to simply confirm the rational basis for the railroad's employment policies and decisions; rather, those reasons must be "so powerful and clear that termination would have occurred apart from the protected activity." *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-12 (ARB Oct. 26, 2012)

Emotional Damages Permitted

A District Court in Connecticut held that emotional damages are permitted as "compensatory damages" under FRSA. *Barati v. Metro-North Commuter Railroad*, Case No. 3:10CV1756 (JBA) (District of Connecticut, March 22, 2013).

Managers as Defendants

A District Court in Georgia held a Manager of Administrative Services was properly named, along with the railroad, as a defendant in a FRSA whistleblower case. *Windom v. Norfolk Southern Railroad Co.*, 2013 WL 432573 (M.D. Georgia 2013)

No Jurisdiction to Enforce Preliminary OSHA Orders to Reinstate Employees

The District of Idaho held it did not have jurisdiction to enforce a preliminary order issued by OSHA requiring the railroad to reinstate an employee. To be enforceable, a reinstatement order from OSHA must be final. *Solis v. Union Pacific Railroad Co.*, 2013 WL 440707 (District of Idaho 2013)

Charge Letters and Disciplinary Investigators May Constitute "Adverse Action"

Where the employee was injured and the injury was a contributing factor in the decision to issue a charge letter and conduct an investigation, the ARB held that charge letters issued to the employee and the disciplinary investigation that stretched over one year qualified as "any other discrimination" prohibited by statute. *Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-18 (ARB Dec. 21, 2012).

Temporal Proximity not a Factor where One Incident Leads to Both Injury and Discipline

In a favorable ruling for BNSF, an ALJ held that complainant failed to prove that his protected activity was a contributing factor in various adverse employment actions. The ALJ noted that while the complainant received discipline in close temporal proximity to his injury report, the proximity was explained by the fact that the circumstances giving rise to the discipline and the injury report were one and the same. *Carr v. BNSF Railway*, ALJ 2012-FRS-00014 (March 28, 2013).

BNSF Reaches Voluntary Accord with OSHA

On January 15, 2013, OSHA announced it had reached a voluntary accord with BNSF concerning the railroad's disciplinary and safety practices with regard to injured employees. OSHA had challenged these practices under the Whistleblower Protections of the Federal Rail Safety Act.

The major terms of the accord include:

- Changing BNSF's disciplinary policy so that injuries no longer play a role in determining the length of an employee's probation following a record suspension for a serious rule violation. As of August 31, 2012 BNSF has reduced the probations of 136 employees.
- Eliminating a policy that assigned points to employees who sustained on-the-job injuries
- Revising a program requiring employees to have increased safety counseling *(Continued on page 4)*

OSHA Updates *(Continued from Page 3)* and prescribing operations testing to eliminate work-related injuries as a basis for enrolling employees in the program. As part of the negotiations leading up to the accord, BNSF removed approximately 400 workers from the program.

- Instituting a higher level review by BNSF's upper management and legal department for cases where an employee who reports an on-duty injury is also assessed discipline for the same injury
- Implementing a training program for BNSF's managers, labor relations and human resources professionals to educate them about their responsibilities under the FRSA. The training will be incorporated into BNSF's annual supervisor certification program.
- Making settlement offers to 36 employees who filed whistleblower complaints with OSHA alleging they were harmed by one or more of the company's previous policies.

OSHA stated the agreement, "sets the tone for other railroad employers...to take steps to ensure that their workers are not harassed..."

If you have specific questions, please contact Kristin Bevil at (312) 252-1504 or at kbevil@fletcher-sippel.com

OSHA v FRA: Who Controls?

We're all familiar with the FRA but what is OSHA's jurisdiction on railroad property? In some circumstances, there is no clear answer but one thing is certain – both FRA and OSHA have an enforcement role in the railroad industry.

A good starting point to understand the inter-relationship of OSHA and FRA is the FRA's policy statement issued on March 14, 1978. The Statement followed the FRA's withdrawal of a rulemaking on railroad occupational safety and health. The FRA determined it made no sense to issue rules on the subject when general employee safety was already addressed by OSHA. The Policy Statement discussed the jurisdictional interplay between OSHA and FRA. Even though it is somewhat dated, the Statement's general approach is still applicable today. As a rule of thumb, within the shops and fixed facilities, generally OSHA is going to apply. Out on the rail line, FRA rules will likely apply. That's not a hard and fast rule and we are seeing more and more overlap; however it certainly appears OSHA is taking a much more aggressive role in enforcing its regulations in the rail industry.

Since 1978, both FRA and OSHA have expanded their regulatory reach. OSHA now has primarily responsibility for implementing whistle-blowing protections for employees and has stepped up its role in the areas of personal protective equipment and respiratory protection. OSHA regulations have generally always applied to the issue of hazardous material communication (the MSDS requirement) because the FRA doesn't feel it has the same competency to deal with this issue and the impact of chemicals on human exposure is not unique to railroads.

On the other hand, the FRA has adopted or implemented its own rule making even where there is an OSHA requirement on the same topic, primarily because FRA wants to deal with specific situations related to the railroad industry. Case in point: the impact of engine noise on rail employees. FRA has adopted its own rulemaking on occupational noise exposure even though there is an OSHA occupational noise standard. We will keep you informed on the FRA/OSHA overlap in upcoming Newsletters and F&S alerts. If you have specific questions, please contact Michael Barron at (312) 252-1511 or mbarron@fletcher-sippel.com or Kristin Bevil at (312) 252-1504 or kbevil@fletcher-sippel.com.

Railroad Retirement Taxes *(Continued from Page 1)* The Appellate Court agreed, ruling that the Board's decision in *Indiana Boxcar* was arbitrary and capricious because the RRB failed to justify departing from its previous precedent. The court vacated the decision and remanded the matter back to the Board.

We don't know yet what the RRB will do with this case on remand, but it is hard to think of any convincing reason for the Board to change its mind about this issue after 20 years. The simple fact that there is now a different Chair at the RRB will probably not satisfy the D.C. Circuit as adequate justification. Fletcher & Sippel attorneys will continue to work with the ASLRRA and individual companies until this issue is finally resolved. If you have any questions, please contact Ron Lane at 312-252-1503 or rlane@fletcher-sippel.com.

TRANSACTIONAL TIPS

Indemnity – Does it Cover Your FELA Losses?

What is indemnity? Simply put, indemnity is an agreement between two parties setting forth which party will pay for losses incurred as a result of their contractual relationship. It is basically an insurance policy and what it covers depends on what the parties include in the indemnity clause. Sometimes it is limited to losses caused by either party to a third party. However, frequently it is used to specify how the parties will distribute losses due to their own negligence. It can also be used to shift the risks between the parties to require the non-negligent party to pay for losses cause by the negligence of the other party.

Negligence, on the other hand, is a common law tort concept. With or without a contract, the law will hold parties responsible for damages resulting from their own negligence; however common law does not usually impose damages on a non-negligent party for someone else's negligence. Common law is determined on a state-by-state basis or on the law developed by federal courts. In view of this, parties to a contract often want to reach an agreement as to how the negligence of the two will be handled rather than leave it to the vagaries of common law, i.e., use an indemnity clause. Because an indemnity clause is a contractual mechanism that alters what a court might otherwise impose if the contract were silent, most courts insist that the intention of the parties be clear.

Just like a release agreement, many states do not favor agreements that alter the common law, such as indemnity clauses. Courts generally interpret such agreements strictly – and some states more strictly than others. Hence, the more specific you are, the better the chance a court will find that you and your contracting partner intended the result dictated by the language of the clause. For example, a court may interpret language where one party indemnifies the other for its "negligence" – a term defined by the common law – differently from language that refers to the "acts or omissions" of a party resulting in losses to the other. And if you are trying to shift the risk, most courts will want to be absolutely sure bother parties understood and intended that a non-negligent party agreed to pay for losses resulting from the "negligence" or the "acts or omissions" of the other party.

This is particularly true when you are trying to shift liability for the railroad's non-delegable duty to its employees under the Federal Employer's Liability Act (FELA) onto the other party. Some courts will simply not accept that a party understood it would be bearing these damages, even when the language is all inclusive, such as "injury to or death of persons whomsoever." Moreover, in some circumstances, the railroad can be found strictly liable for injury to its employees and not all courts interpret "strict liability" as "negligence."

The best option is to be clear. I know you hate those "including but not limited" to clauses that lawyers put in agreements but sometimes there's a very good reason for them. If you want an indemnity clause to cover FELA losses, say so, either by specifically saying, "including but not limited to losses pursuant to FELA" or "railroad losses attributed to injury to or death of its employees" or similar language. If you want the agreement to cover losses for the railroad's strict liability, say so. This removes the doubt and ambiguity that trouble all courts trying to interpret the intent of the contracting parties. Example on point: a recent case out of the 8th Circuit (federal court covering the Dakotas, Minnesota, Nebraska, Iowa, Missouri and Arkansas). In *Liefort v DM&E* (January 2013), the 8th Circuit ruled that, because indemnification is a contractual issue and because FELA is not considered "common law" negligence, you cannot assume a party understood or intended that FELA damages be covered by an indemnity clause that referred only to the "negligence" of the other. For indemnification to apply to an FELA claim, the 8th Circuit says you have to specifically mention the FELA. For more information please contact Janet Gilbert at (312) 252-1507 or at jgilbert@fletcher-sippel.com

Can You Move Your Lawsuit To Another Court?

One of the first things we do when we are asked to defend a client in a lawsuit is determine whether the case can be transferred to a more convenient or more favorable forum. It is hard to dispute the reality that some forums are more favorable to plaintiffs than others. The U.S. Chamber of Commerce regularly evaluates courtrooms around the country for fairness in treatment of corporate defendants and has identified those it deems to be openly antagonistic, referring to them as the "hell-hole" counties. It is not unusual for a plaintiff to file his or her lawsuit in a perceived favorable forum even if the case has little or no connection with the chosen forum. We also often see plaintiff's counsel filing in a forum close to his or her office either for the convenience or because the attorney needs to get the case on file quickly before the statute of limitations runs.

***Forum Non Conveniens*—What is it?**

Assuming the chosen court has jurisdiction over the defendant (most often because the company does business in the particular state), a court can transfer or dismiss a case pursuant to a common law doctrine known as *forum non conveniens*. In most state courts, if the new forum is in the same state, the court can simply transfer the case. If it's in a different state, the court actually dismisses the case (usually subject to the defendant identifying a more appropriate forum and waiving the statute of limitations to allow the plaintiff to file in the more appropriate forum). In federal court, the court can transfer the case to another division within the district or can transfer the case to another district court where appropriate.

The Judge's decision to grant or deny a *forum non conveniens* motion is a balancing act. The Judge weighs various factors derived from judicial precedent to determine if, in the interests of justice, there is a more convenient courtroom in which to try a given case. In making the decision, a court generally gives great deference to the plaintiff's choice of forum -- unless the plaintiff does not live in the chosen forum. A court also considers where the incident took place, the location of material events, the relative ease of access to sources of proof, the ability of a party to compel the presence of material witnesses, the convenience of the witnesses, the relative convenience of the parties and the interests of justice, such as docket congestion and the local interest in the case. The location of expert witnesses is usually given little or no weight, as is the location of the attorneys trying the case.

Is a Motion to Move a Case Worth it?

If the plaintiff lives in a different forum, the accident happened elsewhere, or the majority of witnesses are located in another forum, then trying to move a case is a viable option and should be part of your strategic planning. Would the alternate forum tend to have a less hostile jury pool? Has the client had a favorable or unfavorable experience in any of the potential forums? Are there key procedural differences, such as how the two courts consider admissibility of evidence or how they treat third-party contribution? Is the length of time a case takes to get to trial a significant factor? Would the move help settle the case? If you would like to discuss *forum non conveniens* transfers or would like copies of the favorable orders we have obtained, please contact Jim Helenhouse at 312-252-1501 or at jhelenhouse@fletcher-sippel.com or Janet Gilbert at 312-252-1507 or jgilbert@fletcher-sippel.com.

Upcoming Events

April 27 — May 1st, 2013	**ASLRRA Annual Convention and 100th Anniversary** *Atlanta Marriot Marquis — Atlanta, GA*
May 16th, 2013	**Traffic Club of Chicago** *Hilton Chicago — Chicago, IL*
May 29-31st, 2013	**North American Rail Shippers Annual Meeting & Seminar** *Baltimore Hilton—Baltimore, MD*
August 5-9th, 2013	**Railroad Liability Seminar** *The Coeur d'Alene — Coeur d'Alene, ID*

If you would like more information on upcoming events please contact thines@fletcher-sippel.com.

Congrats Colleen!!

Fletcher & Sippel is pleased to announce the addition of Colleen Konicek as a new partner. But being new partner wasn't enough. On April 9th, Colleen won her first attempt at political office. She is now Trustee-elect of Barrington Hills — AND she was the top vote getter among other candidates running for the Board! Way to go Colleen!

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